IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

GOVERNMENT EMPLOYEES INSURANCE COMPANY @1156317, a foreign corporation, as subrogee of KAREN DRUMMOND, and KAREN DRUMMOND, individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. CPU4-09-003112
VICTORIA KIRKPATRICK and STATE OF DELAWARE - FLEET SERVICES,	)	
Defendants.	)	

Submitted: June 6, 2011
Decided: June 17, 2011

Upon Consideration of Defendants' Motion for Summary Judgment
DENIED

Michael K. DeSantis, Esq., The Law Office of Dawn L. Becker, Wilmington, Delaware, Attorney the Plaintiffs.

Marc P. Niedzielski, Esq., State of Delaware Department of Justice, Wilmington, Delaware, Attorney for Defendants.

ROCANELLI, J.

This matter comes before the Court on a Motion for Summary Judgment pursuant to Court of Common Pleas Civil Rule 56 filed by Defendants Victoria Kirkpatrick and the State of Delaware - Fleet Services ("State"). At the Court's request, the parties briefed the issues for its consideration. The Court finds that oral argument is not necessary. For the reasons set forth below, the Defendants' Motion for Summary Judgment is denied.

The instant matter involves a subrogation action to recover proceeds paid as a result of an automobile accident. In their Complaint filed May 4, 2009, Plaintiffs Government Employees Insurance Company ("GEICO"), as subrogee of Karen Drummond, and Karen Drummond, individually, seek to recover amounts paid to GEICO's insured, Drummond, for personal injuries that she sustained as the result of a motor vehicle accident on January 8, 2007. For injuries sustained by Drummond in the accident, GEICO claims that it paid the policy limits of $15,000 to its insured, Drummond, for medical treatment. Drummond also paid a $500 deductible, which she seeks to recoup.

The parties do not dispute that, at the time of the accident, the vehicle driven by Kirkpatrick was owned by the State of Delaware's Fleet Services Division.[1] The State further concedes that Kirkpatrick was a duly authorized employee of the State acting within the scope of her employment at the time of the accident.[2]

State of Delaware -- Fleet Services now moves this Court for summary judgment arguing that, because the State is an exempt entity under the Financial Responsibility Act, 21 *Del. C.* § 2901, no action in subrogation may be maintained against it or its employee

[1] Paragraph 6 of Defendants' Answer to the Complaint.
[2] Paragraph 7 of Defendants' Answer to the Complaint.

pursuant to 21 *Del. C.* § 2118(g). In essence, the State argues that it is immune from subrogation claims filed by a no-fault carrier under Delaware law. GEICO disagrees with this contention, and avers that it does have standing to subrogate against the State to recover no-fault benefits paid to its insured. Under Delaware law, according to GEICO, the State is the equivalent to a "self insured" party for subrogation purposes, when the State conducts itself in the same manner as a private citizen. The State has conceded that it is a self-insured entity.[3] Because the Delaware Financial Responsibility Law permits subrogation against an uninsured or self-insured party, the Court finds that the State is liable under Delaware law and the State's position is without merit.

A motion for summary judgment requires the Court to examine the record to determine whether any genuine issues of material fact exist or whether one party should prevail as a matter of law.[4] If, after viewing the record in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact exists, then summary judgment is appropriate.[5] However, summary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[6]

DISCUSSION

The question presented in this Motion for Summary Judgment is whether a no-fault carrier can subrogate against the State of Delaware to recover no-fault insurance benefits paid to its insured whose vehicle was struck by a State-owned, and State-insured,

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[3] Plaintiffs' Answering Brief citing Defendants' Answers to Interrogatories at 10.
[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[5] Court of Common Pleas Civil Rule of Procedure 56(c); *Hammond v. Cold Industries Operating Corp.*, 565 A.2d 558, 560 (Del. 1989); *Celotex Corp. v.Catrett*, 477 U.S. 317, 323 (1986).
[6] *Wilson v. Triangle Oil Co*, 566 A.2d 1016, 1018 (Del. 1989).

vehicle. The Court finds that, under these facts, the holdings of *State Farm Mutual Automobile Ins. Co., as subrogee of Steven Wurst v. United States of America*[7] and *Waters v. United States*[8] are instructive. Accordingly, a No-Fault carrier may subrogate to recover benefits paid to its insured. The State is not exempt.

1. The defense of sovereign immunity has been waived.

Sovereign immunity is alive and well in Delaware, and will be an absolute bar to all suits against the State, unless the General Assembly has waived the immunity and consents to be sued by legislative act.[9] The Delaware Tort Claims Act, 10 *Del. C.* § 4010 *et seq.*, prescribes exceptions to the doctrine of sovereign immunity. Specifically, Section 4012 permits tort suits against the State in three categories, one of which includes the ownership, maintenance or use of vehicles. Moreover, Section 6511 of Title 18 waives the "defense of sovereignty" to the extent that the risk or loss is covered by the State insurance coverage program, regardless of whether the insurance is commercially procured or by self-insurance.[10]

Here, neither the State, nor its employee, is being sued as a result of any action performed in an official capacity. Moreover, the State has not pursued its previously asserted affirmative defense of sovereign immunity.[11] More importantly, sovereign

[7] Farnan, J., 2003 WL 21730524 (D. Del.).
[8] 787 A.2d 71 (Del. 2001).
[9] *Holden v. Bundek*, 317 A.2d 29, 30 (Del. Super. 1972).
[10] On page 2, footnote 1 of its Reply Brief, the State concedes that the State of Delaware maintains a self-insurance program pursuant to Chapter 65 of Title 18 and said program incorporates the terms and conditions of a prior commercial business auto policy.
[11] In Paragraph 17 of the Defendants' Answer, the defense asserts the affirmative defense of sovereign immunity. However, since that initial responsive pleading, the State has not pursued that defense.

immunity does not apply under the circumstances presented here per the Delaware Tort Claims Act.

2. The State is not exempt from subrogation actions under Delaware law.

The Court must now address whether a no-fault carrier has standing pursuant to the Delaware Financial Responsibility Law to subrogate against the State to recover no-fault benefits paid to an insured who was injured as a result of an accident with a State-owned and operated vehicle.

Delaware's Financial Responsibility law, referred to as the "No-Fault Statute," 21 *Del. C.* § 2118, requires all operators of motor vehicles within the state to purchase certain insurance to protect and compensate all persons injured in automobile accidents.[12] The law requires motorists to carry, and insurance carriers to provide, specific minimum amounts of both liability and no-fault/PIP compensation coverage.[13] The legislative intent behind the no-fault statute is

> 'to impose on the no-fault carrier . . . not only primary but ultimate liability for the [injured party's] covered medical bills to the extent of [the carrier's] unexpended PIP benefits.'[14] The purpose of section 2118 is to allow person injured in automobile accidents to receive from their own carriers 'the economic benefit of immediate payment without awaiting protracted litigation.'[15]

Section 2118(g) of Title 21 confers the right upon a no-fault carrier to bring a subrogation action. The only express limitation is that carriers may not subrogate against

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[12] *Hudson v. State Farm Mut. Ins. Co., 569* A.2d 1168, 1171 (Del. 1990).
[13] 21 *Del. C.* §2118(a).
[14] *National Union Fire Insurance Company of Pittsburg v. Fisher,* 692 A.2d 892, 895 (Del. 1997) (citing *International Underwriters, Inc. v. Blue Cross & Blue Shield of Del., Inc.*, 449 A.2d 197, 200 (Del. 1982)).
[15] *Id.* at 895-6 (quoting *United States Fidelity and Guar. Co. v. Neighbors,* 421 A.2d 888, 890 (Del. 1980)).

an individual tortfeasor who has a third party insurer.[16] The ultimate policy goal is to "hold the tortfeasor liable by granting the insurer a subrogation right."[17]

The State argues that Section 2901 of Title 21 specifically exempts State-owned vehicles from the mandates of the Delaware No-Fault Statute. According to the State, as section 2118 serves to enforce the requirements of the No-Fault Statute, it follows that an entity exempted from its provisions is exempted from coverage pursuant to Section 2118. The Court does not agree.

This precise question in the context of a State-owned vehicle is a matter of first impression for Delaware. The issue was recently raised by the State of Delaware in *State Farm Automobile Insurance Company, a/s/o Eleanor Koger v. State of Delaware Department of Natural Resources and Environmental Control (DNREC) and Noah S. Moss*.[18] However, the Superior Court granted summary judgment for the State on other grounds, and never reached the issue addressed by this Court herein. Notwithstanding the lack of precedent, decisional law in the context of subrogation actions by a no-fault insurer against the federal government does address the issue head-on, and is instructive to the Court. Based on that case precedent, the Court concludes that the State is not exempt from a suit in subrogation.

In *Waters v. The United States*, the Delaware Supreme Court was asked via certified question whether a no-fault carrier who paid no-fault benefits to its insured could subrogate against the United States. The Court held that the no-fault insurer had a legal right to subrogate against the United States to recover the no-fault benefits paid to

[16] *Waters*, 787 A.2d at 73.
[17] *Id.*
[18] C.A. No. 9C-10-244 (Del. Super Ct. May 31, 2011) (Jurden, J.) (Mem. Op.).

its insured. In addressing whether the federal government was subject to subrogation, the Court discussed the State of Delaware's status as a self-insured entity and applied that analysis to the federal government to conclude that the federal government was likewise effectively self-insured. The *Waters* Court reasoned that the State is in essence a "self-insured" entity, insofar as it provides financial security for its employees, at least equivalent to the insurance requirements contemplated by state law. The Court explained that the statutory limitations on subrogation rights prescribed by Section 2118 do not apply to "self insured" tortfeasors. As the United States is most closely aligned with a "self insured" entity, the no-fault carrier was entitled to subrogation under the Delaware Financial Responsibility Law. Of particular note is the Court's discussion in *dicta* regarding the policy goals of the no-fault statute, "one of which was to hold the tortfeasor liable by granting the insurer a subrogation right."[19]

The United States District Court for the District of Delaware, applying Delaware law, addressed a similar question in *Wurst*, cited *infra*, but took the *Waters* analysis a step further. In *Wurst*, an insurer brought suit to recover no-fault insurance benefits paid to its insured after an accident with a U.S. Postal Service truck. The Court rejected the claim that the United States was immune from subrogation, and found that, under the Federal Tort Claims Act, the United States will be subject to tort liability under state law to the same extent as private individuals.[20] Subrogation actions will be permitted under Section 2118 to the extent that a private individual is either uninsured or self-insured. As in *Waters*, the Court determined that the United States, because it is not insured by a third

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[19] *Id.*

[20] *State Farm Mutual Automobile Ins. Co., as subrogee of Wurst*, 2003 WL 21730524, at *1.

party insurer, is "best analogized to a self-insured party under Delaware law."[21] As a self-insured entity, the no-fault carrier was free to subrogate directly against the United States.

Waters and *Wurst* are factually distinct to the extent that those cases addressed the issue of subrogation by a no-fault carrier in the context of the federal government and the Federal Tort Claims Act. Nevertheless, such variation constitutes a distinction without a difference. The Delaware legislature enacted a state counterpart to the federal legislation -- the Delaware Tort Claims Act. Just as the federal government is subject to tort liability to the same extent as a private individual, it follows that the State would be held to the same standard under Delaware Tort Claims Act. Moreover, as discussed previously, the State concedes its self-insured status.[22] As a self-insured entity under Delaware law, the State is subject to liability in negligence when it operates as a private individual under the same circumstances.[23]

While the State is correct that it is not obligated to provide the mandatory minimum coverage required of commercial insurers under the No-Fault Law, such exemption should not be mistaken for exclusion. The State offers no support for its conclusion that the State is immune from subrogation claims. Indeed, the Court notes in Paragraph 21 of the Defendants' Answer to the Complaint that the Defendants jointly

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[21] *Id.* at *2.

[22] Even if the State had disputed the "self-insured" classification, this Court would find that the State should be considered the equivalent of a "self-insured" entity. As explained by the courts in *Waters* and *Wurst*, where the entity against whom subrogation is sought provides its employees with financial security at least equivalent to that required by the state no-fault law, it is most readily analogized to a self-insured entity.

[23] Because the parties have not raised the question, this Court does not address whether this dispute between an insurer and a self-insured entity would be required to submit to arbitration before the Commissioner pursuant to 2118(g)(3).

assert as a defense that "Plaintiffs' damages, if any, must be reduced by the operation of 21 *Del. C.* § 2118." Query why the State would seek the benefits of a statute that it simultaneously argues does not apply. It appears that the State is using the No-Fault Act as a shield and a sword.

Moreover, the State does not refer the Court to any legislative history or point to any decisional law which supports its contention. In addition to the absence of legal or legislative authority, the State offers no reasoned analysis as to why this Court should rule in its favor. Unsupported conclusions which rely upon untested assumptions are the beginning and end of the State's argument.

On the other hand, both public policy and the decisional law militate in favor of allowing GEICO to subrogate against the State as a self-insured party. The District Court's *Wurst* decision and the Delaware Supreme Court's decision in *Waters* support GEICO's claim for subrogation. Moreover, there can be no public policy basis to allow the State to avoid subrogation as a self-insured entity when it is acting in the community as a private citizen would act, i.e. operating a motor vehicle. To conclude otherwise would undermine the no-fault statute and the purpose it serves in the community.

CONCLUSION

Therefore, the State has failed to demonstrate that there is no genuine issue of material fact as to its exempt status rendering it immune from this lawsuit. As a genuine issue of material fact exists as to the State's liability under Delaware law, the State is not entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED, this 17th day of June, 2011, THAT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS HEREBY DENIED.

Andrea L. Rocanelli

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The Honorable Andrea L. Rocanelli